Re Kelvin Lee See Fooi; ex p BSN Commercial Bank Malaysia Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY PETITION NO D1–29–776 OF 1997
VINCENT NG J
7 DECEMBER 2005

Bankruptcy — Discharge — Application — Official Assignee's report — Failure of report to state delaying tactics of judgment debtor to avoid being adjudged bankrupt — Report omitted that statement of affairs of judgment debtor was filed late — Report did not disclose financial standing of judgment debtor — Whether report sufficient to support discharge — Bankruptcy Act 1967 s 33

Bankruptcy — Discharge — Application — Statement of affairs lodged with Official Assignee after two years, whether amounted to an offence — Whether discharge should be allowed — Bankruptcy Act 1967 ss 16(2)(b) & 33

Bankruptcy — Discharge — Application — Inability to settled at least 50% of debt — Whether bankrupt should be discharged — Bankruptcy Act 1967 s 33, (6)(f) & (g)

The judgment debtor ('JD') was adjudicated a bankrupt via adjudication order and receiving order both dated 30 April 1998. He applied to be discharged under s 33 of the Bankruptcy Act 1967 ('the Act'), but the Senior Assistant Registrar ('SAR') dismissed the application. The JD appealed.

The court looked into the conduct of the report of the Official Assignee ('the OA') dated 2 March 2005 prepared under s 33(3) of the Act ('the OA's report'). The OA's report stated that the JD had not contravened any provisions under the Act or ss 412 to 424 of the Penal Code.

Held, dismissing the appeal with costs:

(1) In an appeal of this nature, this court has the jurisdiction, and is in fact duty bound to rehear the appeal on the facts and merits, unfettered by the decision and findings of the SAR (see para13).

(2) Section 31(1) of the Act requires the OA to investigate the JD's exact financial standing. The primary duty of such investigation is upon the OA (see para 15); *Lau Kah Lay, Re; ex p Cold Storage (M) Bhd* [2001] 6 MLJ 311 followed.

(3) If the court were minded to grant the application for discharge the court must surely know the financial situation of the JD in order to determine how the balance of the debt could be settled. In this case, the OA in his report failed to disclose the monthly salary of the JD and whether he had any other means

of income besides what he had disclosed. The monthly expenses of the JD were also not indicated in the report. Furthermore, what other assets owned by and in possession of the JD, either in his name or in his nominee/s, failed to find its place in the report. The court would thus hold that the OA had failed to produce a competent report receivable by this court under s 31(1) of the Act. Therefore, the OA's report was not sufficient to support the JD's application for discharge, as it fell far short of disclosing the actual financial situation of the JD and the report must be disregarded (see para 16).

(4) In the present case, the JD was adjudged bankrupt on 30 April 1998, but the statement of affairs of the JD was only lodged with the OA two years later. This was a clear contravention of s 16(2)(b) of the Act and an offence under the Act. There was no evidence tendered by either the JD or the OA that an extension had been granted by the OA or that there was reasonable excuse for the JD's delay in filing the statement of affairs. The OA's report stated that the JD did not commit any offence under the Act whereas there was evidence of blatant disregard to observe s 16(2)(b) of the Act and no explanation was forthcoming to address the non-compliance of the mandatory provisions (see para 18).

(5) There were various applications and appeals filed by the JD in attempting to avoid being adjudged a bankrupt, which were dismissed with costs or struck off by the court. Based on the facts of this case, the court could only to assume that they were filed for the purpose of delaying the bankruptcy proceedings. Not only had those applications and appeals caused unreasonable delays but had also put the judgment creditors to unnecessary and substantial expenses. This clearly contravened s 33(6)(f) and (g) of the Act. Yet, the OA's report chose to turn a blind eye to this and not a word was about this continuous conduct of the JD in this report (see para 20).

(6) A perusal of the OA's report showed that JD's credit balance in his account was RM44,248.50 as compared to his approved debt of RM422,297.70, which would enable dividends of approximately only 8.54% to be declared to the creditors. There was no evidence whatsoever from the bankrupt as to why his assets were insufficient to declare a dividend of no less than 50%. It was therefore undisputed that the JD's assets were not of a value equal to RM50 per centum of the amount of his unsecured liabilities as stated in s 33(6)(m). Thus, there was no basis whatsoever to allow a discharge of the JD as a bankrupt when s 33(6)(f) and (g) was taken into account (see para 21).

(7) The OA had not in its report condescended upon any particulars to show that he had concerned himself with the pertinent question of whether the JD would be able to settle the full debt or at least 50% of same if a conditional discharge is granted by this court. From the contents of the QA's report it was apparent therefore that the dividend declared was insufficient and was not a reasonable or fair amount to cover the debt incurred by the JD. To allow the discharge of a JD on these terms would make a mockery of the right to bankruptcy proceedings available to creditors, and of the provisions of law legislated to safeguard the interests of creditors. It would not only lead to a decline in business morality but would also result in great injustice to judgment creditors (see para 23).

[Bahasa Malaysia summary

Penghutang penghakiman diisytiharkan bankrap melalui perintah penghukuman dan perintah penerimaan yang mana kedua-duanya bertarikh 30 April 1998. Penghutang penghakiman memohon untuk dilepaskan menjadi bankrap di bawah s 33 Akta Kebankrapan 1967 ('Akta tersebut') tetapi Penolong Kanan Berdaftar telah menolak permohonan tersebut. Penghutang penghakiman telah merayu.

Mahkamah telah melihat kandungan laporan Pegawai Pemegang Harta ('PPH') bertarikh 2 Mac 2005 yang disediakan di bawah s 33(3) Akta tersebut ('Laporan Pegawai Pemegang Harta'). Laporan Pegawai Pemegang Harta menyatakan bahawa penghutang penghakiman tidak campur tangan dalam sebarang peruntukan-peruntukan di bawah Akta atau ss 412 hingga 424 Kanun Jenayah.

Diputuskan, menolak rayuan denga kos:

(1) Di dalam satu rayuan sebegini, mahkamah ini mempunyai bidang kuasa dan adalah obligasinya untuk mendengar semula rayuan atas fakta-fakta dan merit, tidak terlepas dari belenggu keputusan dan dapatan Penolong Kanan Pendaftar (lihat perenggan 13).

(2) Seksyen 31(1) Akta tersebut memerlukan Pegawai Pemegang Harta untuk menyiasat keadaan tepat kewangan penghutang penghakiman. Obligasi utama penyiasatan sebegini adalah terletak pada Pegawai Pemegang Harta (lihat perenggan 15); *Lau Kah Lay, Re; ex p Cold Storage (M) Bhd* [2001] 6 MLJ 311 diikut.

(3) Jikalau mahkamah berhasrat untuk memberikan permohonan bagi pelepasan kebankrapan, mahkamah mestilah memastikan keadaan kewangan penghutang penghakiman terdahulu bagi memastikan bagaimana keseimbangan hutang boleh diselesaikan. Di dalam kes ini, Pegawai Pemegang Harta, di dalam laporannya gagal mendedahkan gaji bulanan penghutang penghakiman dan sama ada beliau mempunyai sebarang pendapatan selain daripada apa yang telah didedahkan. Perbelanjaan gaji bulanan penghutang penghakiman juga tidak ditandakan di dalam laporan. Lagipun, apa lagi aset-aset yang kepunyaan dan berada dalam milikan penghutang penghakiman, sama ada di dalam namanya atau pun di dalam penerima namaan gagal dicatatkan di dalam laporan tersebut. Mahkamah akan putuskan bahawa Pegawai Pemegang Harta telah gagal menghasilkan satu laporan yang cekap yang boleh diterima oleh mahkamah ini di bawah s 3(1) Akta tersebut. Oleh itu, laporan Pegawai Pemegang Harta adalah tidak mencukupi untuk menyokong permohonan penghutang penghakiman bagi pelepasan bankrap kerana gagal mendedahkan keadaan kewangan yang sebenar penghutang penghakiman dan laporan tersebut perlu diendahkan (lihat perenggan 16).

(4) Di dalam kes ini, penghutang penghakiman telah diisytiharkan bankrap pada 30 April 1998 tetapi kenyataan hal-ehwal penghutang penghakiman hanya dilaporkan kepada Pegawai Pemegang Harta dua tahun kemudian. Ini merupakan suatu pelanggaran di bawah s 16(2)(b) Akta dan satu pelanggaran di bawah Akta tersebut. Tidak ada keterangan yang diberikan oleh

penghutang penghakiman atau Pegawai Pemegang Harta bahawa satu perlanjutan masa telah diberikan oleh Pegawai Pemegang Harta atau di mana terdapat alasan munasabah bagi kelewatan penghutang penghakiman dalam memfailkan kenyataan hal-ehwal (statement of affairs). Laporan Pegawai Pemegang Harta menyatakan bahawa penghutang penghakiman tidak melakukan sebarang kesalahan di bawah Akta tersebut sementara terdapat keterangan bahawa s 16(2)(b) Akta tersebut telah dengan terang-terangnya diendahkan dan tiada alasan yang sesuai untuk di tujukan terhadap ketidakpatuhan peruntukan-peruntukan mandatori (lihat perenggan 18).

(5) Terdapat pelbagai permohonan dan rayuan yang telah difailkan oleh penghutang penghakiman dalam percubaan untuk dielakkan daripada diisytiharkan bankrap yang mana telah ditolak dengan kos ataupun dibatalkan oleh mahkamah. Berdasarkan fakta-fakta yang telah dibentangkan dalam kes ini, mahkamah hanya boleh menjangkakan permohonan-permohonan tersebut difailkan bagi tujuan melewatkan prosiding kebankrapan. Bukan sahaja permohonan dan rayuan tersebut telah mengakibatkan kelewatan yang tidak munasabah tetapi juga telah meletakkan pemiutang penghakiman untuk menanggung perbelanjaan yang tidak perlu dan banyak. Ia jelas bertentangan dengan s 33(6)(f) dan (g) Akta tersebut. Malah, laporan Pegawai Pemegang Harta tidak menyatakan tentangnya dan tidak disebutkan tentang perlakuan berterusan penghutang penghakiman dalam laporan ini (lihat perenggan 20).

(6) Penelitian laporan Pegawai Pemegang Harta menunjukkan baki kredit penghutang penghakiman dalam akuannya adalah RM44,248.50 berbanding dengan hutang beliau yang diluluskan iaitu RM422,297.70, yang membolehkan hanya lebih kurang 8.54% dividen diisytiharkan kepada pemiutang. Tiada keterangan apapun daripada si bankrap berhubung kenapa aset-asetnya tidak cukup untuk mengisytiharkan tidak kurang daripada 50% dividen. Tidak dipertikaikan bahawa aset-aset penghutang penghakiman bukanlah nilai yang sama dengan RM50 peratusan jumlah liabiliti-liabiliti tidak dijamin beliau sebagaimana yang dinyatakan dalam s 33(6)(m). Oleh itu, tiada asas untuk membenarkan pelepasan penghutang penghakiman sebagai seorang bankrap apabila s 33(6)(f) dan (g) diambilkira (lihat perenggan 21).

(7) Pegawai Pemegang Harta dalam laporannya tidak menunjukkan apa-apa butiran bahawa beliau hirau dengan persoalan penting sama ada penghutang penghakiman mampu menyelesaikan hutang penuh atau sekurang-kurangnya 50% daripadanya jika pelepasan bersyarat diberikan oleh mahkamah ini. Berdasarkan kandungan laporan Pegawai Pemegang Harta, adalah jelas bahawa dividen yang diisytiharkan tidak mencukupi dan bukan jumlah yang munasabah atau adil untuk menutup hutang yang ditanggung oleh penghutang penghakiman. Untuk membenarkan pelepasan penghutang penghakiman atas terma tersebut akan menjadikan sindiran tentang hak kepada prosiding kebankrapan yang sedia ada kepada pemiutang; dan tentang peruntukan undang-undang yang digubal untuk melindungi kepentingan pemiutang. Ia bukan sahaja akan mengakibatkan kejatuhan moral perniagaan tetapi juga akan menyebabkan ketidakadilan kepada pemiutang penghakiman (lihat perenggan 23).]

Notes

For cases on application for discharge on bankruptcy, see *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2404–2416.

Cases referred to

BBMB Factoring Bhd v Mariam bte Sasiman & Ors [2000] 4 MLJ 20 (refd)
Pathmasingam Mavilaganan, Per; ex p Public Bank Bhd [2000] 2 CLJ 92 (refd)
Lau Kah Lay, Re; ex p Cold Storage (M) Bhd [2001] 6 MLJ 311 (folld)

Legislation referred to

Bankruptcy Act 1967 ss 16(2)(b), (3), 31(1), 33(3), (4), (6)(f), (g), 92
Bankruptcy Rules 1969 r 196(3)
Penal Code ss 421, 422, 423, 424

Thaiyub Khan (Thaiyub Khan Othuman & Co) for the appellant/judgment debtor.
Josephine Robert (Arun & Co) for the respondent/judgment creditor.

Vincent Ng J:

BACKGROUND

[1] This is an appeal by Kelvin Lee See Fooi, the judgment debtor ('JD') against the decision of the senior assistant registrar ('SAR') in dismissing the JD's application (encl 41) for an order of discharge as a bankrupt under s 33 of the Bankruptcy Act 1967 ('the Act'). It is pertinent to note that including the present application under appeal, the JD had filed in all three applications for discharge from bankruptcy. The first one was made on 27 July 2002, which was struck out by the court on 29 October 2002 with liberty to file afresh. The second was filed on 3 September 2003 and was dismissed by the SAR on 14 April 2004. The third application for discharge, which is now the subject matter of this appeal was filed on 14 September 2004.

FACTS OF THE CASE

The facts of this case can briefly be stated as follows:

[2] The JD was adjudicated a bankrupt via adjudication order and receiving order both dated 30 April 1998. Before and after the said order was made, the court had dismissed and struck off a series of interlocutory applications and appeals to the judge in chambers filed by the JD to derail the bankruptcy petition. The applications and appeals were:

(i) encl 5 – an application to set aside the bankruptcy notice which was struck out on 18 August 1997;

(ii) encl 12 – an application to reinstate encl 5 which was dismissed with costs on 23 April 1998;

(iii) encl 16 – an application through a notice to oppose the creditors petition which was dismissed with costs on 30 April 1998;

(iv) encl 18 – an application to set aside the creditors petition which was dismissed with costs on 30 April 1998;

(v) encl 23 – an appeal against dismissal of enclosure 12, which was dismissed on 20 July 1998 for non-appearance;

(vi) encl 24 – an appeal against dismissal of encl 18, which was dismissed on 20 July 1998 for non-appearance;

(vii) encl 25 – an appeal against the adjudication order and receiving order dated 30 April 1998, which was dismissed on 20 July 1998 for non-appearance;

(viii) encl 27 – an application for stay of the execution of the adjudication order and receiving order, which was dismissed on 12 October 1998 with costs;

(ix) encl 33 – an application to reinstate encl 12 that was struck out on 20 April 1999.

[3] Two years after the adjudication and receiving order was made, on 10 April 2000 to be exact, the JD filed his statement of affairs wherein he submitted his current liability as RM310,474.51 but omitted to state therein that he had any assets.

[4] First creditors meeting was held on 26 September 2000 and the JD readily agreed to pay RM100 per month, with effect from 1 April 2000, towards settlement of his debts. On the direction of the Director General of Insolvency, the monthly payment was increased to RM200 beginning from August 2003. The JD paid the instalments punctually.

[5] The JD has made three applications for discharge, including the one under appeal, and all of them were dismissed.

[6] It is undisputed that the JD has not paid any of the costs incurred by the judgment creditors on the previous unsuccessful applications and appeals, in his battle against the bankruptcy petition.

[7] The judgment creditor ('JC') filed the notice of intention to oppose the application for discharge pursuant to r 196(3) of the Bankruptcy Rules 1969 dated 5 April 2005.

[8] The Official Assignee ('OA') filed the Laporan Ketua Pengarah Insolvensi dated 2 March 2005 under s 33(3) of the Act. The report showed that the JD's credit balance in his account was RM44,248.50 as opposed to his approved debt of RM422,297.70, which was sufficient to declare dividends of approximately only 8.54% to the creditors. As only the JC filed proof of debt, it was the sole creditor.

[9] The said OA's report stated that the JD is 47 years old and works as a palm oil broker with a company called Syarikat Saint Management (M) Sdn Bhd. He is married and lives in a rented house. There was no mention whether the JD has any children.

[10] The report further states that the JD was made a bankrupt through an action brought by the JC against him as a guarantor for loan given to a company, which was secured by two properties. The security was auctioned off in 2001 after several previous failed attempts.

[11] The report also states that the JD has not committed any offence under the Act, in particular, under s 33(6) or ss 421, 422, 423 and 424 of the Penal Code. Besides this factor, before me the OA stated that he has no objection to the application for discharge because there were no outstanding fees or disbursements by JD due to the OA.

[12] This appeal is filed under and pursuant to s 92 of the Act which provides as follows:

(1) the court may review, rescind or vary any order made by it under its bankruptcy jurisdiction;

(2) orders in bankruptcy matters shall, at the instance of any persons aggrieved, be subject to appeal in the same way as orders of the High Court in other matters are for the time being appealable.

[13] It is established principle that in an appeal of this nature, this court has the jurisdiction, and is in fact duty bound to rehear the appeal on the facts and merits, unfettered by the decision and findings of the SAR (see the case of *BBMB Factoring Bhd v Mariam bte Sasiman & Ors* [2000] 4 MLJ 20.).

WHETHER THE OA'S REPORT DATED 2 MARCH 2005 COULD BE ACCEPTED?

[14] In considering this appeal, it is necessary to look into the conduct of the OA as well as the report by OA dated 2 March 2005 prepared under s 33(3) of the Act ('the OA's Report').

Section 33(3) of the Act states as follows:

> On the hearing of the application, the court shall take into consideration a report of the Official Assignee as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy, and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property.

[15] Section 31(1) of the Act requires the OA to investigate the JD's exact financial standing. In *Re Lau Kah Lay & Tang Kuong Tiew; ex p Cold Storage (Malaysia) Bhd* [2001] 6 MLJ 311, the court in response to the OA's contention that it is up to the creditors to do their investigation, stated that the primary duty of such investigation is upon the Official Assignee. His Lordship Ian Chin J in his judgment at p 315 on this point had this to say:

The Official Assignee carries the onerous task of ensuring that a bankrupt has no hidden assets stashed away whether in his name or in the name of his wife or children as otherwise people will be imbued with the message that money borrowed can be stashed away and need not be repaid and such horde can be enjoyed even when one is a bankrupt. If the Official Assignee does not show itself equal to the task of preventing such rip-off the creditor, then cases of borrowers not repaying and not minding to be made bankrupt will be the rule rather than the exception. Then business morality will decline.

[16] If the court minded to grant the application for discharge the court must surely know the financial situation of the JD in order to determine how the balance of the debt could be settled. Furthermore, the OA in his report failed to disclose the monthly salary of the JD and whether he has any other means of income besides what he had disclosed. The monthly expenses of the JD was also not indicated in the report. Furthermore, what other assets owned by and in possession of the JD, either in his name or in his nominee/s, failed to find its place in the report. I would thus hold that the OA has failed to produce a competent report receivable by this court under s 31(1) of the Act. I would thus hold that the OA's report is not sufficient to support the JD's application for discharge, as it fell far short of disclosing the actual financial situation of the JD and the report must be disregarded.

INABILITY TO PAY 50% DIVIDEND FROM THE AVAILABLE CREDIT

[17] Section 33(4)of the Act inter alia provides that where a bankrupt has committed any offence under the Act, the court shall either refuse the discharge or suspend the order until a dividend of not less than 50% has been paid to the creditors. The OA's report states that the JD has not contravened any provisions under the Act or s 412 to s 424 of the Penal Code.What the court must determined now is that whether that statement is correct based on the available evidence adduced before the court.

[18] Paragraph two of the OA's report states that the debtor's statement of affairs was filed by the bankrupt on 10 April 2000. Section 16(2)(b) of the Act requires that the statement of affairs to be filed within 21 days from the date of the receiving order unless an extension has been granted by the OA. Section 16(3) of the Act provides that if the debtor fails to do so without reasonable excuse, proof of which shall lie on him, he shall be guilty of contempt of court and may be punished accordingly. In the present case, the JD was adjudged bankrupt on 30 April 1998 but the statement of affairs of the JD was only lodged with the OA two years later. This is a clear contravention of s 16(2}(b) of the Act and an offence under the Act. There is no evidence tendered by either the JD or the OA that an extension had been granted by the OA or that there was reasonable excuse for the JD's delay in filing the statement of affairs. The OA's report stated that the JD did not commit any offence under the Act whereas there is evidence of blatant disregard to observe s 16(2)(b) of the Act and no explanation was forthcoming to address the non-compliance of the mandatory provisions.

[19] It is to be noted that s 33(4) of the Act further provides that on proof of the facts mentioned in sub-s 6, the court shall either refuse the order, suspend the order

for a specified time, suspend the order until a dividend of not less than 50% has been paid to the creditors, or grant an order of discharge subject to such conditions aforesaid. The factors for consideration, under s 33(6) of the Act, that are relevant and applicable adversely to the JD in the present case include inter alia, the following:

> (6) The facts hereinbefore referred to are —
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> ...
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> (f) that the bankrupt has delayed or put any of his creditors to unnecessary expenses by a frivolous or vexatious defence to any action or other legal proceedings properly brought or instituted against him;
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> (g) that the bankrupt has brought on or contributed to his bankruptcy by incurring unjustifiable expense in bringing any frivolous or vexatious action;
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> ...
>
> (m) that the bankrupt's assets are not of a value equal to fifty ringgit per centum of the amount of his unsecured liabilities...

[20] I have earlier set out the various applications and appeals filed by the JD in attempting to avoid being adjudged a bankrupt, which were dismissed with costs or struck off by the court. Indeed, some of the applications and appeals were struck off for non-appearance of JD on the hearing date. His non-appearance at the hearing dates reflects poorly on his intention and motive in filing those applications and appeals. I can only to assume that they were filed for the purpose of delaying the bankruptcy proceedings. If at all the applications and appeals had any merits surely the JD or his counsel would have been more vigilant on court appearances. In my view, not only had those applications and appeals caused unreasonable delays but had also put the JC to unnecessary and substantial expenses. This clearly contravenes s 33(6)(f) and s 33(6)(g) of the Act. Yet, the OA's report chose to turn a blind eye to this and not a word was said about this continuous conduct of the JD in this report.

[21] Next, a perusal of the OA's report showed that JD's credit balance in his account is RM 44,248.50 as compared to his approved debt of RM422,297.70 which would enable dividends of approximately only 8.54% to be declared to the creditors. There is no evidence whatsoever from the bankrupt as to why his assets are insufficient to declare a dividend of no less than 50%. It is therefore undisputed that the JD's assets are not of a value equal to RM50 per centum of the amount of his unsecured liabilities as stated in s 33(6)(m). Thus, there is no basis whatsoever to allow a discharge of the JD as a bankrupt when s 33(6)(f) and s 33(6)(g) is taken into account.

[22] In *Per Pathmasingam Mavilaganan; ex p Public Bank Bhd* [2000] 2 CLJ 92, the court was of the opinion that the bankrupt in that case should not be discharged on account of the fact that his assets were sufficient to declare only a dividend of 31.27%.

[23] More importantly, in this regard I note that the OA has not, in his report, condescended upon any particulars to show that he had concerned himself with the

pertinent question of whether the JD would be able to settle the full debt or at least 50% of same if a conditional discharge is granted by this court. From the contents of the OA's report, it is apparent therefore that the dividend declared is insufficient and is not a reasonable or fair amount to cover the debt incurred by the JD. In my view to allow the discharge of a JD on these terms will make a mockery of the right to bankruptcy proceedings available to creditors, and of the provisions of law legislated to safeguard the interests of creditors. It will not only lead to a decline in business morality but will also result in great injustice to judgment creditors.

[24] For all the above the reasons, the appeal ought to be and is now dismissed with costs, and the SAR's order dismissing the application for discharge as a bankrupt is here affirmed.

Appeal dismissed with costs.

Reported by Loo Lai Mee